



**Republic v Waweru (Criminal Case 52 of 2018)  
[2024] KEHC 10979 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10979 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL CASE 52 OF 2018  
DO CHEPKWONY, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**STEPHEN KIGONDU WAWERU ..... ACCUSED**

**JUDGMENT**

1. The Accused Person, Stephen Kigonda Waweru faces a charge of Murder under Section 203, as read with Section 204 of the Penal Code. The particulars of the offence as articulated in the charge sheet are that on the 10th day of December, 2017, at Kiawaroga Village in Kiambu County, the Accused, jointly with other persons not before the court, unlawfully murdered one Joseph Njenga Kigera. The hearing formally commenced on 14<sup>th</sup> February, 2019, whereupon the Accused Person entered a plea of not guilty to the offence of murder.
2. Following the Accused's plea of not guilty, the prosecution commenced its case on 10<sup>th</sup> July, 2019 and presented ten witnesses, all of whom testified against the Accused. These witnesses include: Felix Mwangi Kigera (PW1), Liberata Waithera Njoroge (PW2), Antony Githaiya Mwaura (PW3), CPL Charles Maina PW4, APC Simon Churi Mwangi (PW5), Peter Mwithiga Ndungu (PW6), Sebastian Klawa Mareria (PW7), Eliud Mathu Nyoike (PW8), DR Peter Ndegwa (PW9), PC Benard Korir (PW10).
3. PW1, Felix Mwangi Kigera, a brother of the deceased, testified that on the 10<sup>th</sup> December, 2017 his sister-in-law, Liberata Waithera Njoroge (PW2), came to his house to express her concern about the whereabouts of her husband, the deceased. Together, they initiated a search for him, visiting local centers, hospitals, and eventually reporting his disappearance at Karabaini Police Post. The following day, they resumed their search, now accompanied by two children. While searching near a tea farm, one of the children spotted a body, which they confirmed was that of the deceased. Felix testified that the body had visible injuries, indicating that the deceased had been subjected to violence before his death.



4. During cross-examination, PW1 confirmed that he did not personally witness the events leading to his brother's death, nor did he observe any altercation or fight involving the deceased.
5. PW2, Liberata Waithera Njoroge, the deceased's wife, provided a recollection on her husband's final day. She testified that on the 10th of December, 2017, at approximately noon, the deceased returned home with visible injuries, including deep cuts, and informed her that he had been attacked by Stephen Kigundu Chege, Mbugua, and both individuals were known to her. She advised him to seek medical treatment, after which he left the house but did not return. Concerned by his absence, she sought help from PW1, and together they searched various locations, including hospitals and police stations. Her testimony corroborated PW1's account regarding the discovery of the deceased's body the following day in a tea farm. PW2, further stated that, upon learning that a suspect had been arrested, she went to the police station and it was the Accused Person, whom she knew as a friend of her late husband and a regular visitor to their home.
6. Under cross-examination, PW2 reaffirmed that the Accused was indeed a friend of her late husband. She also reiterated that the deceased had specifically named Chege Mbugua, and the Accused Person, as the individuals who had attacked him.
7. PW3, Antony Gathaiya Mwaura, an Assistant Chief, testified that on the 11<sup>th</sup> of December 2017, PW1 and PW2 approached him to report the disappearance of the deceased, who had allegedly been involved in a fight with Chege, Mbugua, and the Accused, who they also referred as Karuthi.  
He advised them to formally lodge a report at Tigoni Police Station, which they did. Later that day, PW3 received a call informing him that the body of the deceased had been discovered in a tea farm. He immediately notified the police and accompanied them to the scene. While on patrol later that day, Mwaura spotted the Accused, whom he knew was a suspect in the murder, and facilitated his arrest.
8. During cross-examination, Mwaura admitted that he did not witness the actual fight involving the deceased and the Accused.
9. PW4, CPL Charles Maina, corroborated the testimony of PW3, stating that while patrolling with him, they encountered and arrested the Accused. He further testified that he was not personally present during the events that led to the deceased's death, but he played a role in the investigation following the discovery of the body.
10. PW5, APC Simon Churi Mwangi, testified that on the 10th of December, 2017, the deceased visited Tigoni Police Post to report that he had been assaulted by Mbugua, Karuthi (the alias of the Accused), and Chege and he recorded the complaint vide OB number 02 of 10<sup>th</sup> December 2017. He noted that the deceased had visible injuries, including a swollen face and a cut on his shoulder, and advised him to seek medical attention. At approximately 4:00 PM, the deceased called PW5 again, stating that he was being assaulted. He stated that he went to the scene on a motor cycle but the attackers were no longer present and he advised the deceased to go to hospital. That later learned that the deceased's body had been discovered, and that the Accused had been arrested in connection with the incident.
11. During cross-examination, PW5 confirmed that the deceased's had indeed called him the second time and reported an ongoing assault. However, by the time he arrived at the scene, he only met the deceased as the assailants had fled.
12. PW6, Peter Mwithiga Ndungu testified that on 8<sup>th</sup> December, 2017, he hired a man at an agreed cost of Kshs.3,000/= to maintain his borehole and he came on 9<sup>th</sup> December, 2017 with two other men unknown to him. He stated that the men worked that day. He testified that while he was working at his shamba a man came to him and reported that he had been attacked by one Mbugua who was one



- of the three men and he showed him cuts on his back. He advised the injured man to go to the hospital for treatment. He stated that he confronted the said Mbugua who said that they had disagreed over a machine but he later learned that the deceased had died.
13. PW7, Sebastian Kalana Mareria, the officer who conducted the identification parade, testified that the Accused was identified by a witness during the parade on the 8th of December, 2018. He emphasized that the parade was conducted in accordance with standard procedures and that he was also involved in the investigation of the case.
  14. PW8, Eliud Mathu Nyoike, a casual worker, testified that he had been mandated to dig a hole and while working, he noticed that he did not have oxygen blower and sought to borrow the machine from the deceased who unfortunately informed him that he had lent it to other people. Nonetheless, he went to check if he could get the machine afterwards and he met Karuthi, Mbugua and Gicheya. He requested for the machine blower and the deceased called Mr. Mbugua asking him to pay for the machine but the said Mbugua refused to pay saying that he had not used the machine for that day disagreement arose between the deceased and Mbugua over the blower, which escalated into a heated quarrel.
  15. He added that he later asked his co-worker, Muturi to call Njenga ‘the deceased’ but was informed that the deceased was then in the hospital. He stated that he later went to look for the deceased but was informed that his body had been found in a tea farm. On cross examination, he stated that when there was a quarrel, he left the deceased with Mbugua and that he did not see the deceased being killed.
  16. PW9, Dr. Peter Muriuki Ndegwa, a pathologist, testified that he performed a post-mortem examination on the body of the deceased. His findings revealed extensive external bruises, particularly on the left side of the head, a fractured skull, and a massive epidural hematoma on the left side of the brain. He concluded that the cause of death was a cerebral injury resulting from blunt force trauma to the head caused by blunt weapon. He presented the post mortem report as PEXB3.
  17. On cross-examination, he confirmed that the wounds suffered by the deceased were not stab wounds. That he identified the deceased’s mouth had animal bites and it was too difficult estimate the date the deceased died.
  18. PW10, P.C, Benard Kiprono Korir, the investigating officer, presented a detailed account of the investigation. He testified that following the deceased’s death, he was assigned to the case. His inquiries revealed that the deceased had been involved in a fight with the Accused, Mbugua, and another individual, Chege. He collected witness statements, gathered evidence, and arrested the Accused. He produced all the documents in the case including the OB for Muna Police Post as PEXB5, Sketch Map PEXB 4, Post mortem report PEXB3, ID Parade PEXB 2.
  19. On cross-examination, he stated that he was not the one who started investigation but took over the case months later and he relied on the statements already recorded by the witnesses. He stated that in the initial OB report the deceased did not disclose his attackers and by the time he took over the case, the accused person had already been arrested however, the other two persons believed to have committed the attack with the accused person were never arrested to date. That he visited the scene and took photographs and acknowledged that there were no direct eye witness who saw the deceased being assaulted and that the weapons which were used during the attack were never recovered.
  20. In re-examination, PW10 confirmed that the deceased had been attacked twice by three people, one of whom was the accused and stated that the others escaped.
  21. The court found that the accused had a case to answer vide the ruling delivered on 7<sup>th</sup> July, 2022, and consequently, the accused was called to his defence.



22. The Accused testified in his defence on 30<sup>th</sup> March, 2023 and in his sworn testimony, he maintained that none of the witnesses had mentioned him or seen the alleged fight. He pointed out that witnesses, particularly PW8, had identified Mbugua, not him, as being involved in the fight with the deceased.
23. He recounted the events of 9<sup>th</sup> and 10<sup>th</sup> December, 2017, stating that he was working alongside Mbugua and Peter Gicheha. According to him, a fight had broken out between Mbugua and the deceased over an oxygen blower. He saw Mbugua strike the deceased on the head with a fork-jembe handle, and Chege, Mbugua's brother, joined the fight, cutting the deceased with a panga. The accused claimed that he intervened and separated them before the deceased left.
24. He stated that after completing his work, he was paid and went for a drink. He asserted that no witness had seen him fight the deceased, and he had no reason to kill him.
25. In his view, the deceased is alleged to have died on two days under the OB numbers one being OB/02/10/12/2017 at 1500hours and OB/04/20/11/2018 and he pointed the uncertainty to court.
26. He stated that after completing his work, he was paid and went for a drink. He asserted that no witness had seen him fight the deceased, and he had no reason to kill him.
27. In re-examination, he maintained that he did not assault the deceased.

### **Analysis and Determination**

28. I have carefully considered the evidence presented by the prosecution, the defence taken by the accused person as well as the submissions dated 27<sup>th</sup> October 2023 filed by the prosecution. The case was based primarily on circumstantial evidence, as no direct eyewitness account was presented to link the Accused to the crime. The prosecution presented several witnesses to establish the chain of events and circumstantial facts, which, it contended, proved the Accused's guilt beyond a reasonable doubt. The Accused Person, on the other hand, denied the charge, arguing that he was not involved in the murder and providing an alibi for the day in question.
29. Therefore, the main issue before this court is whether the prosecution has discharged its burden of proof, establishing beyond a reasonable doubt that the Accused is guilty of the offense of murder. In determining this, the court must evaluate the sufficiency of the circumstantial evidence presented by the prosecution and whether it meets the legal threshold to warrant a conviction. To do so, this court will consider to determine the following questions:-
  - a. Whether the fact of the deceased's death has been established.
  - b. Whether the death was caused by unlawful actions or omissions.
  - c. Whether there is sufficient evidence linking the Accused to the unlawful act.
  - d. Whether the evidence presented is sufficient to prove the case beyond a reasonable doubt.
  - e. Whether the circumstantial evidence meets the threshold established in law.

### **Fact of Death**

30. It is not in dispute that the deceased, Joseph Njenga Kigera, passed away on the 10<sup>th</sup> of December, 2017. PW1, Felix Mwangi Kigera, testified that the deceased's body was found on a tea farm with visible injuries, and PW9, Dr. Peter Ndegwa, conducted a post-mortem which concluded that the cause of death was cerebral injury resulting from blunt force trauma to the head. Therefore, the fact of death has been satisfactorily established.



### **Whether the death was caused by unlawful actions or omissions**

31. The second issue for consideration is whether the death of the deceased resulted from an unlawful act. Based on the medical evidence provided by PW9, it is clear that the injuries sustained by the deceased were consistent with a violent assault. The trauma to the head and the fractured skull indicates that the deceased was subjected to a brutal attack. This court, therefore, finds that the deceased's death was indeed caused by an unlawful act.

### **Whether the Evidence Links the Accused to the Crime**

32. The prosecution's case largely rests on circumstantial evidence, particularly the testimony of PW2, Liberata Waithera Njoroge, who claimed that the deceased named the Accused, along with two other individuals, Mbugua and Chege, as his attackers shortly before his death. Additionally, PW5, APC Simon Churi Mwangi, testified that the deceased reported the assault to the police and mentioned the same names. He added that the deceased had called him late informing him for a second time that he was being attacked by three people. However, when he went to the scene, he did not find the alleged attackers and he did not inform the court whom these attackers were. He clarified that he had directed the deceased to seek medical attention but according to the prosecution, the second call made by the deceased is in their view a dying declaration which implicates the Accused. In my view, it is well established that the probative value of a dying declaration must be treated with caution and should be made by a person who is about to die. In the case of *Choge -vs- Republic* [1985] eKLR, the Court of Appeal held that: -

“A statement made by a person who is about to die may be admitted in evidence in criminal cases. However, it must be appreciated that this kind of evidence is dangerous, as it is made in the absence of the accused and cannot be tested by cross-examination. A dying declaration must be corroborated to be safely acted upon by a court.”

33. In the present case, the dying declaration is said to be premised in the second call made to PW2 and the declarations made by the deceased to his wife, PW2. However, there is no collaboration that the deceased died immediately after these two declarations. Indeed, after telling his wife that he had been assaulted by the accused person in conjunction with others, the accused person proceeded to the police to make a report and even upon making a call to report a subsequent attack, PW5 clarified that he saw the accused and advised him to first seek medical assistance since his attackers were no were to be found. Undoubtedly therefore, the accused was not about to die when he made these statements since he appeared to both PW2 and PW5 as strong enough to take himself to hospital and it would not be safe for this court to consider that evidence as a dying declaration. There seem to have been a third alteration after PW5 had allowed deceased to proceed to hospital which resulted to his death.
34. On the other hand, for circumstantial evidence to form the basis of a conviction, it must meet specific legal criteria. In *Sawe -vs- Republic* [2003] KLR 364, the Court of Appeal laid down the principles governing circumstantial evidence, stating: "In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. Circumstantial evidence must exclude co-existing circumstances which may weaken or destroy the inference of guilt."
35. Applying this principle, the circumstantial evidence in this case does not meet the threshold required to convict. The testimony of PW2, being the declaration made by the accused person about his attackers, is the cornerstone of the prosecution's case, but it is not corroborated by any other piece of evidence.



Additionally, the presence of other named individuals—Mbugua and Chege—who were not brought before the court, creates a significant gap in the prosecution’s case.

36. Moreover, the Accused’s alibi creates a reasonable hypothesis of innocence. The prosecution has not conclusively ruled out the possibility that someone else could have committed the crime, and the evidence linking the Accused to the murder is too tenuous to exclude all reasonable doubt.

### **Conclusion**

37. The law is clear that the burden of proof in criminal cases lies with the prosecution and must be discharged beyond a reasonable doubt. The Accused has no obligation to prove his innocence, but merely to raise a reasonable doubt as to his guilt.
38. In this case, the prosecution has failed to meet the high standard required to secure a conviction. The circumstantial evidence, while suspicious, does not conclusively point to the guilt of the Accused, and the alleged declarations, standing alone without corroboration, cannot be relied upon as the sole basis for conviction.

### **Final Orders**

39. I find that the prosecution has failed to prove its case beyond a reasonable doubt. The circumstantial evidence presented does not meet the legal threshold to convict the Accused of murder hence the Accused, Stephen Kigundu Waweru, is hereby acquitted of the charge of murder under Section 215 of the Criminal Procedure Code.
40. The Accused is to be set at liberty forthwith unless otherwise lawfully held.
- It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

M/S Ndeda counsel for State

Mr. Muriuki counsel for accused

Court Assistant - Martin

